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No. 83-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KINNETT DAIRIES, INC.,

Petitioner,

v.

DAIRYMEN, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION BRIEF OF RESPONDENT, DAIRYMEN, INC.

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the courts below clearly err in finding that respondent Dairymen, Inc. ("DI") never possessed, acquired or maintained the power to control prices or exclude competition in any relevant geographic market or submarket? If not, the claim of monopolization was properly dismissed.

2. Did the courts below clearly err in finding that DI had no specific intent to monopolize? If not, the claims of attempt to monopolize and conspiracy to monopolize were properly dismissed.

3. Did the courts below clearly err in finding that DI, even if it intended to monopolize, had no dangerous probability of success? If not, the claim of attempt to monopolize was properly dismissed.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	1
A. Course Of Proceedings And Disposition In The District Court	2
1. DI As A Capper-Volstead Cooperative	4
2. DI As An Ordinary Business Corporation	6
a. Relevant Product And Geographic Markets	6
b. Market Power	7
c. Intent To Monopolize And Probability Of Success	8
B. Disposition In The Court Of Appeals	9
REASONS FOR DENYING THE PETITION	10
I. The Petition Presents No Important Issue Of Federal Law	11
II. The Eleventh Circuit's Decision Is In Harmony With The Decisions Of The Sixth Circuit, Other Circuits And This Court	13
A. The Courts Below Employed The Correct Legal Standards To Evaluate The Lawfulness Of DI's Conduct	13
B. The Courts Below Employed The Correct Geographic Market Analysis	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Alexander v. *National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 2108 (1983) 15

Berkey Photo, Inc. v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) . 15

Fairdale Farms, Inc. v. *Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981) 5

Fairdale Farms, Inc. v. *Yankee Milk, Inc.*, 715 F.2d 30 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3510 (January 9, 1984) 5, 6

Hodges v. *United States*, 368 U.S. 139 (1961) 12

Kinnett Dairies, Inc. v. *Dairymen, Inc.*, 512 F. Supp. 608 (M.D. Ga. 1981) ..... *passim*

Maryland & Virginia Milk Producers Association, Inc. v. *United States*, 362 U.S. 458 (1960) 5, 15

National Gerimedical Hospital and Gerontology Center v. *Blue Cross of Kansas City*, 452 U.S. 378 (1981) 14

Pacific Eng. & Prod. Co. of Nevada v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) 15

Pullman-Standard, Inc. v. *Swint*, 456 U.S. 273 (1982) 16

Smith v. *Butler*, 366 U.S. 161 (1961) 12

Tampa Electric Co. v. *Nashville Coal Co.*, 365 U.S. 320 (1961) 6, 10, 17-19

Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594 (1953) 15

Union Leader Corp. v. *Newspapers of New England, Inc.*, 180 F. Supp. 125 (D.Mass.), *aff'd*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) 15, 16

United States v. *Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981) 9, 10, 13-15

United States v. *Dairymen, Inc.*, 1978-1 Trade Cases ¶ 62,053 (W.D. Ky. 1978) 13

United States v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956) 17

Table of Authorities Continued

Page

United States v. *Grinnell Corp.*, 384 U.S. 563 (1966) . 17
United States v. *Johnson*, 268 U.S. 220 (1925) 2
United States v. *Yellow Cab Co.*, 338 U.S. 338 (1949) . 16

STATUTES AND REGULATIONS:
7 U.S.C. § 291 ..... 1, 3-6, 10-12
15 U.S.C. § 1 ..... *passim*
15 U.S.C. § 2 ..... *passim*
15 U.S.C. § 17 ..... 1, 5, 11
Rule 52(a), Fed. R. Civ. P. 2, 11

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OPPOSITION BRIEF OF RESPONDENT, DAIRYMEN, INC.

Respondent Dairymen, Inc. ("DI") respectfully submits this brief in opposition to the Petition For Writ Of Certiorari filed by petitioner Kinnett Dairies, Inc. ("Kinnett") to review the decision of the United States Court of Appeals for the Eleventh Circuit affirming the dismissal of Kinnett's complaint. DI has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

COUNTERSTATEMENT OF THE CASE

Kinnett's petition ("Pet.") seeks to present certiorari-worthy questions by framing and arguing as issues the scope of the antitrust exemption accorded agricultural cooperatives by the Clayton and Capper-Volstead Acts. In doing so, Kinnett wholly ignores the fact that the

courts below ruled against it on traditional antitrust principles without regard to the agricultural exemption or to DI's entitlement to such exemption. Relatedly, the petition attempts to divert attention from the binding effect of Fed. R. Civ. P. 52(a) by inviting the Court to ignore Mr. Justice Holmes' admonition that "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925).

A. Course Of Proceedings And Disposition In The District Court

Kinnett, a proprietary diary processor, filed its complaint (and jury demand) against DI, an agricultural milk marketing cooperative association of individual dairy farmers, on August 2, 1973. The complaint sought treble damages and injunctive relief based on allegations that DI alone and in concert with other agricultural associations of farmers had unreasonably restrained trade in, and had monopolized, attempted to monopolize and conspired to monopolize the supply of, Grade A raw milk in the Georgia Federal Order marketing area in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). 611-12; App. 6-8.[1] As discussed *infra*, Kinnett has abandoned its claim under Section 1.

Shortly before trial and after extensive discovery and the filing of detailed trial briefs and proposed jury instructions, Kinnett sought and obtained the district court's agreement to try the case without a jury. The case was tried to the court for three weeks during May and

[1] Our page references in this counterstatement are to the district court opinion in the official reports, Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608 (M.D. Ga. 1981) followed by references to the Appendices to Kinnett's petition. Appendices A-E are referred to collectively as "App."

June 1980. The trial produced a very large evidentiary record. 611; App. 6.

At the conclusion of the trial, the parties each filed proposed findings of fact and conclusions of law, critiques of each other's proposed findings of fact, replies to these critiques, post trial briefs and a Kinnett reply to DI's brief. On March 10, 1981, the district court issued its opinion and final judgment dismissing the complaint.

In its opinion, the district court set forth in great detail the evidence supporting its extensive findings of subsidiary and ultimate fact pertaining to: the joint and unilateral business activities of DI which Kinnett challenged as unlawful, DI's purpose in engaging in these activities, the relevant product market, the relevant geographic market and absence of submarkets, DI's market power alone and in combination with others, DI's specific intent to monopolize and the probability of successful monopolization. 614-30, 633-41; App. 11-45, 51-68. Upon the basis of these factual findings, none of which Kinnett challenges as clearly erroneous, the district court dismissed the complaint for two separate and independent reasons. The first reason rested upon the Capper-Volstead antitrust exemption. The second did not.[2]

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[2] Kinnett refers to DI's dual status as a "major competitor" of Kinnett in processed milk products as well as a "dominant supplier of raw milk." Pet. at 3-4, 17. But there was no evidence adduced, nor even a contention by Kinnett, that DI monopolized or attempted to monopolize the sale of processed milk products in Georgia or anywhere else. In its complaint, Kinnett advanced the theory that DI as a raw milk supplier discriminated against Kinnett because DI was a processed milk products competitor. However, after extensive discovery Kinnett abandoned this claim prior to trial. 611; App. 6-7.

1. DI As A Capper-Volstead Cooperative

In its trial and post trial briefs Kinnett contended that DI's business activities about which it complained were "predatory." 612,614; App. 7, 11. The district court carefully scrutinized, both separately and collectively, all of DI's challenged "joint" and "unilateral" activities. "Joint" activities were those undertaken by DI jointly with other agricultural cooperatives or cooperative marketing agents, such as the Georgia Superpool, Great Lakes-Southern Milk and the Associated Reserve Standby Pool. 614-17; App. 11-17. "Unilateral" activities were those undertaken by DI independently of other cooperatives to market its own members' milk. These involved DI's premium pricing policy, one-year supply contract program and disputes with certain customers including Kinnett. 617-23; App. 18-30.

After separately describing these activities and making detailed findings of evidentiary fact, the district court found that "when such activities are considered separately or collectively" they "were not competition stifling or predatory in any sense of the word. . . ." 638; App. 62. Thus the district court concluded (*id.*) that DI was fully protected from antitrust liability under both Sections 1 and 2 of the Sherman Act by the Capper-Volstead Act (7 U.S.C. § 291) which provides in material part:

> Persons engaged in the production of agricultural products as . . . dairymen . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their

> members may make the necessary contracts and agreements to effect such purposes. . . .[3]

The district court's conclusion that DI was protected from antitrust liability by the Capper-Volstead Act was based upon the holding on interlocutory appeal in *Fairdale Farms, Inc.* v. *Yankee Milk, Inc.*, 635 F.2d 1037, 1044, 1045 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981) that the Act exempts agricultural cooperative associations from Sherman Act liability unless they engage in predatory behavior. 631-32; App. 48-49. This holding was reaffirmed after remand in *Fairdale Farms, Inc.* v.

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[3] Farmers were a major force behind passage of the Sherman Act. They sought protection from concentrations of power in the packing and related industries from which the farmers purchased their needs and to which they sold their products. But when the same farmers began to organize in order to achieve some countervailing power, they found the Sherman Act used against them on the theory they had combined and conspired in unreasonable restraint of trade. See Maryland & Virginia Milk Producers Association, Inc. v. United States, 362 U.S. 458, 464 (1960).

Congress in 1914 responded to the farmers' need by enacting section 6 of the Clayton Act (15 U.S.C. § 17), which provides in pertinent part:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

But the Clayton Act exemption was limited to non-stock associations and farmers soon found a need to raise capital for processing and marketing their products. They also needed clarification of the terms "operation" and "legitimate objects"—terms which Congress failed to define in the Clayton Act. Congress responded again in 1922 by enacting the Capper-Volstead Act.

Yankee Milk, Inc., 715 F.2d 30 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3510 (January 9, 1984).

2. DI As An Ordinary Business Corporation

The second and independently sufficient reason for dismissal of Kinnett's Sherman Act Section 2 claim was that the district court, upon the basis of extensive and carefully developed factual findings, determined that Kinnett had failed to prove the elements of a monopoly case against DI when viewed as an ordinary business corporation. This reason relied neither upon DI's special status as an agricultural cooperative association nor upon the construction or application of the Capper-Volstead antitrust exemption to which such associations are entitled. 639; App. 63. Rather, it depended only upon subsidiary and ultimate findings of fact, fully supported by detailed evidentiary findings. 618-42; App. 19-70. The district court, treating DI as an ordinary business corporation, focused on whether DI had monopolized, attempted to monopolize or conspired to monopolize.

a. Relevant Product and Geographic Markets

First, the district court accepted Kinnett's contention that the relevant product market was raw Grade A milk, *i.e.*, milk suitable for consumption in fluid form. 623-24, 639; App. 30-31, 63. It then dealt in great detail with the relevant geographic market under the test established by this Court in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The district court separately considered and made specific findings with respect to (1) the area within which DI operated, (2) the area to which Kinnett could practicably turn for an alternative supply, and (3) the effect of federal milk marketing regulations on the availability of alternative supplies. 624-28; App. 32-41. The district court found that the relevant geographic

market was made up of nine Southeastern states and parts of four others. 639; App. 64-65.

The district court rejected Kinnett's contention that either the Georgia Federal Order marketing area or the combined boundaries of federal order areas surrounding Georgia were relevant geographic submarkets. This rejection was based upon evidence concerning the artificial nature of federal order marketing areas, milk's perishability and transportability and alternative supply sources actually utilized by Kinnett, 624-25, 628, 640; App. 33-34, 39-40, 66-67. Upon the basis of this evidence the district court found that Kinnett's area of practicable supply extended beyond the boundaries of its proposed geographic submarkets. 625, 639-40; App. 33-34, 64-67. Kinnett does not challenge these findings.

b. Market Power

Having determined the relevant product and geographic markets, the district court recounted the evidence and made detailed findings concerning DI's market power. The district court found that in the Georgia Federal Order marketing area proposed by Kinnett as the relevant geographic market DI's market share declined steadily from a high of 73% in 1970 to 58% in 1979 (629, 641; App. 42-43); that in the combined area of Georgia and its adjacent states DI's market share never exceeded 42.4% (629; App. 44); that in the thirteen state area found to be the relevant geographic market DI's market share did not exceed 30.2% (*id;* App. 43); that a cooperative's market power is tenuous and transitory (641; App. 68); that government antitrust experts believe that a 75% market share is the minimum necessary for a cooperative to control prices effectively (629; App. 42); and that Kinnett in one five-month period replaced one-third of its DI milk with the milk of defecting DI mem-

bers. 641; App. 68. On the basis of these findings, which are not challenged by Kinnett, the district court found that DI had not monopolized because "[a]t no time relevant to this action has DI possessed, acquired, or maintained the power to control prices or exclude competition in any relevant geographic market." 640; App. 67. DI did not possess such power either alone or in combination with others. 614; App. 67.

c. Intent To Monopolize And Probability Of Success

Much of the district court's analysis concerned DI's intent. In reviewing DI's conduct of which Kinnett complained, the district court repeatedly considered, balanced and resolved on the evidence conflicting contentions concerning DI's purpose. Thus, the district court determined that DI's joint and unilateral activities were all pursued for legitimate marketing reasons and were precipitated in large part by the peculiar nature of milk marketing with its seasonal fluctuations in supply and demand (614-17, 635; App. 11-17, 54.); that DI's disputes with its customers were mainly anecdotal, isolated events in which DI was responding to the customers' aggressive and precipitous behavior (618-23, 637-38; App. 20-30, 59-62); that DI's activities "were not competition stifling or predatory in any sense of the word" (638; App. 62);[4] that DI's activities "did not operate to substantially lessen

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[4] In using the term "predatory," the district court was not referring to conduct in the pejorative sense. The court was referring to conduct evidencing an intent " 'unnecessarily, unreasonably or illegally to exclude a competitor from a market' " and to " 'unfair methods of competition, or business patterns not honestly industrial—in short, what may loosely be called unfair means.' " [Citations omitted.] 631 n. 31; App. 47-48.

competition or to unreasonably restrain trade" (633);[5] and that DI had "no conscious intent to stifle or smother competition or to exclude others from the market place." 643; App. 72. Kinnett does not challenge these findings as clearly erroneous.

From these repeated and detailed determinations of purpose and effect, the district court concluded that DI was not guilty of either an attempt or conspiracy to monopolize because it did not have the requisite specific intent. 641-43; App. 68-72. Based upon its market power analysis (*supra* at 7-8), the district court also found that Kinnett had failed to prove the second element of its attempt to monopolize claim, *i.e.*, that there was a dangerous probability of successful monopolization. 442-43; App. 69, 72.

B. Disposition In The Court Of Appeals

Kinnett did not appeal the dismissal of its Sherman Act Section 1 claim. On September 19, 1983, the Eleventh Circuit (Judge Morgan dissenting) affirmed per curiam the district court's dismissal of the Sherman Act Section 2 claim observing that "[t]he facts of this case are reported in detail in the excellent district court opinion of Judge Bootle." 715 F.2d 520; App. 1. The court of appeals considered "only two [of Kinnett's] arguments worthy of discussion." *Id.* Each was based upon the opinion of the Sixth Circuit in *United States* v. *Dairymen, Inc.*, 660

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[5] Here, and elsewhere in this brief, there is no companion citation because Appendix B omits three paragraphs of the district court opinion. Compare 512 F. Supp. at 633 with Appendix B at 51. The omitted portion contains the quoted passage. These three paragraphs, which undoubtedly were omitted through a printing error, are highly relevant. Because these paragraphs are cited a number of other times in this brief, we suggest that the Court may wish to use the official report of the case in lieu of Appendix B.

F.2d 192 (6th Cir. 1981). Kinnett argued that the opinion of the district court was contrary to that of the Sixth Circuit in two respects: first, that the district court used an overly stringent test of predation and did not focus on DI's intent; and second, that the district court failed to consider relevant geographic submarkets. 715 F.2d at 520-21; App. 1-2.

The court of appeals properly rejected these arguments in quick order. First, the court of appeals held that the district court focused on DI's intent using the precise standard ("an intent to smother competition") articulated by the Sixth Circuit.[6] *Id.* Second, the court of appeals held, without dissent, that the district court's "major and independent reason for rejecting Kinnett's submarket arguments was the failure of the proposed submarkets to coincide even closely with those resulting from the court's application of the [Supreme Court's] *Tampa Electric* test, the very test the Sixth Circuit ordered the district court in that case to apply." *Id.* at 521; App. 2-3.

REASONS FOR DENYING THE PETITION

The courts below, without regard to the Capper-Volstead exemption, found that Kinnett had failed to prove the elements of monopolization, attempt to monopolize or conspiracy to monopolize under Section 2 of the Sherman Act. The necessary subsidiary findings that DI

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[6] We suggest that Judge Morgan was plainly wrong in his belief that the district court held Kinnett to a higher standard of proof than it would have faced against an ordinary business corporation; and that the district court gave only summary treatment to the question of whether DI had a specific intent to monopolize. *Id.* at 521-22; App. 4-5. See discussion *supra* at 8-9. Judge Morgan, however, did not disagree with the majority's rejection of Kinnett's geographic submarket argument.

lacked monopoly power in any relevant geographic market, the specific intent to monopolize and the dangerous probability of success are all amply supported by the evidence and are therefore not "clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a).

The courts below applied the correct legal standards in arriving at these determinations and conducted their legal and factual analyses in accord with the decisions of other circuits and this Court. For these reasons, and because no important questions of federal law have been presented, the petition should be denied.

I. The Petition Presents No Important Issue Of Federal Law

Kinnett's first two arguments are that its petition should be granted because the courts below decided an important issue of federal law not previously settled by this Court in a way which conflicts with this Court's basic precepts. Pet. at 16-26. The important issue of federal law identified is the proper scope of the antitrust exemption accorded agricultural cooperatives (such as DI) by Section 6 of the Clayton Act (15 U.S.C. § 17) and Section 1 of the Capper-Volstead Act (7 U.S.C. § 291). Pet. at 16, 18. No such issue exists.

In its complaint and in the post trial briefing in the district court Kinnett contended that DI's joint activities with other agricultural cooperatives were unreasonable restraints of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. App. 6-7. The district court held that such joint cooperative activities were protected from Sherman Act Section 1 liability by the antitrust exemption. *Supra* at 4-6. Notwithstanding its pejorative characterizations of these joint activities, Kinnett did not assign error to this holding in its appeal to the Eleventh Circuit—nor does it do so here. Instead, it creates a

nonissue by contending that these joint activities show a violation of Section 2 of the Sherman Act which is not protected by the Capper-Volstead exemption. Pet. at 16-26.

As we earlier demonstrated, the district court dismissed Kinnett's Sherman Act Section 2 claim for the independently sufficient reason that Kinnett failed to prove the elements of a Section 2 case against DI as an ordinary business corporation. This reason relied neither upon DI's status as an agricultural cooperative nor upon the construction or application of the Capper-Volstead exemption. See discussion *supra* at 6-9. The Eleventh Circuit affirmed for this reason. It did not consider DI's special status as an agricultural cooperative nor did it consider or even discuss the exemption. 715 F.2d at 520-21; App. 1-3. Accordingly, the important issue of federal law perceived by Kinnett is at best "extraneous" and thus provides no ground for granting the petition. *Hodges* v. *United States*, 368 U.S. 139, 140 (1961). Certiorari should not be granted when it is manifest that the decisions below did not turn on the issue presented by the petition. *Smith* v. *Butler*, 366 U.S. 161 (1961).[7]

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[7] Kinnett seeks to entice the Court with the contention that "no prior case has involved anything like the far-reaching monopoly by combination involved in this case. . . ." *Pet.* at 17. This is the first time that Kinnett has argued monopoly by combination. See appeal brief of petitioner Kinnett at 1-2. Its failure to raise this issue below aside, Kinnett's contention wholly ignores the district court's findings (fully supported by uncontested findings of evidentiary fact) that DI never possessed monopoly power either alone or "in combination with any other organizations." 512 F. Supp. at 641; App. 67. See *supra* at 8. Kinnett does not challenge these findings as clearly erroneous.

Thus, Kinnett is left only with its third and final argument that the Eleventh Circuit's decision is in conflict with that of the Sixth Circuit. Pet. at 26.

II. The Eleventh Circuit's Decision Is In Harmony With The Decisions Of The Sixth Circuit, Other Circuits And This Court

Kinnett presses two arguments to support its contention that the decisions of the Eleventh and Sixth Circuits are in conflict. The first is that the Eleventh Circuit improperly required Kinnett to support its Sherman Act Section 2 claim with proof of "predation." Pet. at 26-28. The second is that the Eleventh Circuit improperly refused to consider geographic submarkets. *Id.* at 28-29. Both arguments are dead wrong. The decisions of the two circuits are, as shown below, in perfect harmony.

A. The Courts Below Employed The Correct Legal Standards To Evaluate The Lawfulness Of DI's Conduct

The linchpin of Kinnett's predation argument (Pet. at 26-27) is that the district court was led astray or was unduly influenced by the district court decision in *United States* v. *Dairymen, Inc.*, 1978-1 Trade Cases ¶ 62,053 (W.D. Ky. 1978) which the Sixth Circuit reversed (660 F.2d 192; App. 76) subsequent to the district court's decision in the *Kinnett* case. Hereafter we refer to *United States* v. *Dairymen, Inc.* as the Government case. However, the decisions below track the Sixth Circuit's decision.

In the Government case, *unlike* the present case, the district court made no finding concerning DI's specific intent. Instead, it dismissed the Government's attempt to monopolize charge because the Government failed to prove that "DI's practices rose to the level of predatory practices, *i.e.*, anticompetitive practices without busi-

ness justification." 660 F.2d at 193-94; App. 80-81. In remanding, the Sixth Circuit instructed the district court there to do what the district court did here, namely, to determine whether DI had a specific intent to monopolize. In making this determination, the Sixth Circuit further instructed the district court that "the most important inquiry is whether these [supply] contracts were intended to stifle competition or were intended to meet legitimate business purposes." 660 F.2d at 195; App. 81.

In the present case, the district court did exactly what the Sixth Circuit in the Government case instructed and more. It determined on the basis of carefully crafted factual findings—none of which are challenged by Kinnett—that the practices of which Kinnett complains were pursued by DI to meet legitimate business purposes. 512 F. Supp. at 614-17, 633, 635; App. 11-17, 54-55.[8] The district court specifically found that DI's practices were *not intended* to "stifle competition" (*id.* at 643; App. 72) or to "smother competition" (*id.*) or to "exclude others from the market place" (*id.*) or to be used as "unfair weapons or means" (*id.* at 641; App. 68); that they did not "substantially lessen competition" or

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[8] For example, after recounting in detail the development and negotiation of DI's supply contracts and other dealings with its customers in light of the "particular economic context" in which they took place (National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 393 n.19 (1981)) the district court found:

> D.I.'s one year written supply contracts and its other dealings with handlers including Kinnett were legitimate means by which D.I. marketed the milk of its members. In particular, the written contracts were reasonable in duration and were necessitated by the nature of milk marketing and the course of dealings between D.I. and its customers.

[*Id.* at 633]

"unreasonably restrain trade" (*id.* at 633); that they were not "predatory in any sense of the word" (*id.* at 633; App. 51-52); and that they were not " 'unfair methods of competition, or business patterns not honestly industrial.' " *Id.* at 631 n. 31; App. 48. Upon the basis of these findings, the Eleventh Circuit rejected Kinnett's predation argument because the district court decision was in harmony with the Sixth Circuit's decision in the Government case. 715 F.2d at 521; App. 2.

It is thus abundantly clear that the courts below employed the entire bundle of legal and factual antitrust standards in determining that DI's practices were neither anticompetitive nor engaged in with the specific intent to monopolize. These standards are straight from the pages of the Sixth Circuit decision in the Government case and from the decisions of this Court and other circuits in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953) ("a specific intent to destroy competition" versus practices "predominantly motivated by legitimate business aims"); *Maryland & Virginia Milk Producers Association, Inc.* v. *United States*, *supra*, 362 U.S. at 463-64 (prohibiting "competition-stifling practices" or "predatory practices"); *Alexander* v. *National Farmers Organization*, 687 F.2d 1173, 1183 (8th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 2108, 2110 (1983) (prohibiting the pursuit of monopoly power "by eliminating or restraining competition with the co-op through predatory or anti-competitive practices"); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (prohibiting conduct "directed at smothering competition."); *Pacific Eng. & Prod. Co. of Nevada* v. *Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) (prohibiting the use of "unfair means"); *Union Leader Corp.* v. *Newspapers of New*

England, Inc., 180 F. Supp. 125, 140 (D.Mass.), *aff'd*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) (prohibiting the use of "unfair weapons").

The courts below having applied the correct legal standards and having found on the basis of detailed uncontested evidentiary findings that DI lacked the requisite specific intent to monopolize, it is clear that Kinnett has presented no ground for certiorari. Recently, this Court in *Pullman-Standard, Inc.* v. *Swint*, 456 U.S. 273, 288 (1982) reaffirmed its holding in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949) that " '[f]indings as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact"—in this case the district court. Here, the district court's unchallenged factual findings as to motive and intent are no more reviewable on certiorari than they were in *Pullman-Standard* and *Yellow Cab*.

Even if it be assumed, arguendo, that the district court clearly erred in its finding of no specific intent, its finding of no dangerous probability of success defeats Kinnett's attempt to monopolize claim. Neither Kinnett nor Judge Morgan's dissent challenges this finding as clearly erroneous.[9]

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[9] Kinnett contends that on remand of the Government case "the district court found that [DI's supply contracts]—the very ones upheld as lawful in our case—were intended to stifle competition and established DI's specific intent to monopolize." Pet. at 26. The district court found no such thing. Rather, it specifically found (as did the district here) that "there are sound business reasons for the execution of committed and full supply contracts of one year's duration." App. 98. While it is true that on all the evidence from a different record the district court on remand in the Government case found a specific intent to monopolize, it highlighted the factual nature of its finding: "In short, the evidence as to specific intent is rather closely balanced, but the Court finds that the balance tips slightly in favor of

B. The Courts Below Employed The Correct Geographic Market Analysis

To establish the offense of monopolization under Section 2 of the Sherman Act one must prove that the defendant actually possesses or possessed monopoly power in a relevant geographic market. The district court, obedient to the dictates of *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) and of *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956), defined such power as the power to control prices or exclude competition. *Supra* at 8. In applying this standard, which Kinnett does not question, the court first determined the relevant product market to be Grade A milk—the product market urged by Kinnett. *Supra* at 6. It then applied, as did the Sixth Circuit, the test of *Tampa Electric Co.* v. *Nashville Coal Co.*, *supra*, 365 U.S. at 327—namely, determination of the area in which Kinnett operated, and to which it could practicably turn for supplies. *Supra* at 6-7.

It is at this point in the analysis that Kinnett portrays the courts below in error. Pet. at 28-29. The mote which Kinnett finds in the eyes of the courts, however, does not relate to the application of the *Tampa Electric* test. Nor does Kinnett complain that the district court failed, in applying that test, to consider each of the geographic submarkets proposed by Kinnett. Indeed, the district court specifically considered, discussed and rejected the

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the United States." App. 91-92. Unfortunately for Kinnett, the district court here made a contrary finding. And, in any event, the district court on remand in the Government case found—as did the district court here—that there was no violation of Section 2 of the Sherman Act because there was no dangerous probability of successful monopolization. App. 94.

smallest geographic unit proposed by Kinnett as the relevant geographic market—*i.e.*, the area of the principal federal market order in Georgia. *Supra* at 7. The district court also specifically considered, discussed and rejected the larger alternative area proposed by Kinnett. *Id.*[10] Kinnett does not assert that these findings of the district court were clearly erroneous.

Kinnett's quarrel with the courts below is one of nomenclature, not substance. The district court was of the view that, having determined from the evidence the relevant geographic market, it was not obliged to determine whether there were, within that market, more restricted "submarkets" for the same product. It was of the view—we think properly—that in a monopolization case a determination that a particular area is the relevant geographic market under the *Tampa Electric* test is an implicit rejection of any other proposed market. In fact, however, the district court's rejection of the Kinnett geographic submarket proposals was not *implicit*. Indeed, it specifically did what it did not feel obliged to do. As noted, the court explicitly dealt with and made factual determinations rejecting each Kinnett proposal—whether one denominates them as proposed geographic "markets" or as "submarkets." Thus, the district court performed the only fact-finding function necessary even were one to agree with the proposition, urged by Kinnett, that a single product having a defined geographic market can at the same time have relevant geographic "submarkets." Pet. at 29.

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[10] Thus, Kinnett is plainly wrong when it contends that the district court "did not even give lip service to the established principle that the Sherman Act applies to 'localized geographic areas.' " Pet at 29 n. 83.

The district court having correctly applied the *Tampa Electric* test and having specifically applied this test in rejecting each of Kinnett's proposed submarkets upon the basis of evidentiary findings which Kinnett does not challenge, it follows that the Eleventh Circuit was correct in its determination that "it would of course serve no purpose to remand for application of that test." 715 F.2d at 521; App. 3.

CONCLUSION

For all of the foregoing reasons, Kinnett's petition should be denied.

Respectfully submitted,

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